Filed 5/23/07 P. v. Luis H. CA2/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. LUIS H., Defendant and Appellant.	B194423 (Los Angeles County Super. Ct. No. VJ31925)

APPEAL from an order of the Superior Court of Los Angeles County. Steff Padilla, Commissioner. Affirmed as modified.

Steven A. Torres, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Paul M. Roadarmel and Scott A. Taryle, Deputy Attorneys General, for Plaintiff and Respondent.

Luis H., a minor, appeals from an order declaring him a ward of the court pursuant to Welfare and Institutions Code section 602[1] by reason of his being under age 21 in possession of alcohol while a passenger in a car (Veh. Code, § 23224, subd. (b)). The juvenile court declared the offense to be a misdemeanor and ordered appellant home on probation subject to specified terms and conditions, including condition Nos., "15. Do not associate with anyone disapproved of by parents and probation officer"[2] and "21. . . . Stay away from places where users congregate." Appellant contends that those conditions are unconstitutionally overbroad, violate his right to associate and travel and must be modified to require that he act knowing he is engaging in the prohibited conduct. The People contend that appellant has forfeited this claim by failing to raise it in the juvenile court.

We modify the challenged probation conditions and otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On October 20, 2005, at 8:30 p.m., Deputy Sheriff Robert Shortridge pulled over a car for a moving violation, in the City of La Mirada, in the County of Los Angeles. Appellant, who was then 17 years old, was in the backseat of the car. When the deputy had him exit the car, he noticed a cold, half-full, open bottle of beer on the floor where appellant had been sitting. When asked, appellant said it belonged to him.

On February 23, 2006, the district attorney filed a section 602 petition alleging that appellant had committed the crime of possession of alcohol in a vehicle by a person

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[1] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

[2] The language of condition No. 15 contained in the minute order differs slightly from the above quoted language from the reporter's transcript. The minute order does not contain the conjunction "and" between the word's "parents" and "probation officer." Further, the minute order appears to have the word "knowingly" handwritten next to condition No. 15.

under age 21.[3] The juvenile court found the allegation to be true, sustained the petition, and declared appellant to be a ward of the juvenile court, placing him on home probation subject to probation conditions, including that he (1) "not associate with anyone disapproved of by parents and probation officer," and (2) "[s]tay away from places where [narcotics] users congregate." Appellant did not object to either of these conditions in the court below.

DISCUSSION

Appellant contends that the probation conditions that he not associate with disapproved persons and stay away from places where drug users congregate are overbroad, violating his First and Fourteenth Amendment rights, including his freedom of association, right to travel and right to assemble. The gravamen of his claim is that neither of these conditions is narrowly tailored because neither requires that he know that he is violating them. He urges that they be modified to provide that he have knowledge that he is engaging in the proscribed conduct before he can be found in violation.[4]

The People contend that because appellant did not object to these conditions in the juvenile court, he waived his appellate challenge to them.[5]

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[3] On September 13, 2006, the petition was dismissed by the People because of their inability to proceed and immediately refiled.

[4] Although condition No. 15 has the word "knowingly" handwritten next to it on the minute order, that does not render appellant's request that the condition be modified to include the requirement of knowledge moot, as the oral pronouncement is the rendition of judgment (*People v. Mesa* (1975) 14 Cal.3d 466, 471) and controls over the minute order prepared as a matter of clerical function (Pen. Code, § 1207). The oral pronouncement did not include a knowledge requirement.

[5] While the People use the term "waiver" in reference to appellant's failing to preserve this claim for appeal because he did not raise the question in the court below, the correct term which we use is "'forfeiture.'" "'Waiver'" is the express relinquishment of a known right whereas "'forfeiture'" is the failure to object or to invoke a right. (*In re Sheena K.* (2007) 40 Cal.4th 875, 880, fn. 1 (*Sheena K.*).)

Forfeiture

After briefing in this matter was completed, the California Supreme Court rendered its decision in *Sheena K., supra,* 40 Cal.4th 875, resolving the forfeiture question before us. In that case, a minor was placed on probation subject to terms and conditions, including the condition that she not "'associate with anyone disapproved of by probation.'" (*Id.* at p. 880.) On appeal, the minor contended that that probation condition was unconstitutionally vague and overbroad, although that claim was never raised in the juvenile court.

The Supreme Court held that a facial challenge that the "phrasing or language of a probation condition is unconstitutionally vague and overbroad because, for example, of the absence of a requirement of knowledge . . . does not require scrutiny of individual facts and circumstances but instead requires the review of abstract and generalized legal concepts—a task that is well suited to the role of an appellate court." (*Sheena K., supra,* 40 Cal.4th at p. 885.) "[A] challenge to a term of probation on the ground of unconstitutional vagueness or overbreadth that is capable of correction without reference to the particular sentencing record developed in the trial court *can* be said to present a pure question of law" (*id*. at p. 887) that is not forfeited by the failure to raise it in the trial court. Consideration and possible correction of such a challenged probation condition is easily remediable by an appellate court and might save the time and government resources that otherwise would be expended in attempting to enforce a condition invalid as a matter of law. (*Ibid*.)

Sheena K. is controlling here. Appellant raises facial overbreadth challenges to two probation conditions that present pure questions of law. (*Sheena K., supra,* 40 Cal.4th at p. 885.) Those claims are therefore not forfeited by appellant's failure to have raised them in the juvenile court.

Validity of conditions

The juvenile court has broad discretion to impose conditions of probation. (§ 730; *In re Christopher M.* (2005) 127 Cal.App.4th 684, 692; see also Pen. Code, § 1203.1.) Section 730 authorizes courts in juvenile cases to "impose and require any and all

reasonable conditions that it may determine fitting and proper to the end that justice may be done and the reformation and rehabilitation of the ward enhanced."

But that discretion is not boundless. (*People v. Garcia* (1993) 19 Cal.App.4th 97, 101.) "[T]he void for vagueness doctrine applies to conditions of probation. [Citations.] An order must be sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated." (*People v. Reinertson* (1986) 178 Cal.App.3d 320, 324–325.) "Regarding the claim of constitutional invalidity, we agree conditions of probation that impinge on constitutional rights must be tailored carefully and 'reasonably related to the compelling state interest in reformation and rehabilitation . . . .' [Citation.]" (*People v. Delvalle* (1994) 26 Cal.App.4th 869, 879.)

In *Sheena K.,* in considering a probation condition forbidding the minor from associating with "'anyone disapproved of by probation,'" a condition virtually identical to one of the conditions here, our Supreme Court reasoned that the underpinning of the vagueness challenge is the due process concept of "'fair warning.'" (*Sheena K., supra,* 40 Cal.4th at p. 890.) The vagueness doctrine "bars enforcement of '"a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application."'" (*Ibid.*) The Supreme Court held that in the absence of an express requirement of knowledge, the probation condition imposed there was unconstitutionally vague because it did not notify the appellant in advance with whom she was precluded from associating. (*Id.* at p. 891.)

While appellant characterizes his constitutional challenge here as one for overbreadth, rather than vagueness as decided in *Sheena K.,* we find that case still controlling. The overbreadth appellant asserts results from the failure of the conditions to include a requirement that he know he is associating with disapproved individuals and know that locations are congregating places for drug users. Such overbreadth derives from the fact that the challenged conditions impermissibly require him to stay away from disapproved persons and places congregated by drug users, whether or not he knows that

they are such persons or places. This type of overbreadth claim is analytically indistinguishable from claims that those conditions are vague because lacking a knowledge requirement, as they are premised upon that very vagueness. Numerous courts have considered such conditions as being both vague and overbroad. (See *In re Justin S.* (2001) 93 Cal.App.4th 811, 816 [condition prohibiting association with "[any] gang members" presents '"a classic case of vagueness"' and "'constitutionally fatal overbreadth'"]; *People v. Garcia, supra,* 19 Cal.App.4th at p. 102 [probation condition that probationer not associate with felons, ex-felons or users or sellers of narcotics unconstitutionally overbroad and violative of the probationer's freedom of association]; *In re Kacy S.* (1998) 68 Cal.App.4th 704 [record did not justify sweeping limitation effected by a probation condition that probationer "'not associate with any persons not approved by his probation officer'"].) We conclude that whether under the vagueness or overbreadth doctrines, the prohibition against associating with disapproved persons condition is unconstitutional, as set forth in *Sheena K.*

While the Supreme Court in *Sheena K.* did not specifically decide whether the condition that appellant stay away from places where users congregate was unconstitutional, we conclude that the principles announced in that decision compel the conclusion that this condition does not pass constitutional muster under the overbreadth doctrine. Because appellant may not know which locations are places where drug users congregate, he may violate the condition that he stay away from such places unintentionally and without knowing he is doing so. The condition is overbroad because it precludes him from staying away from such places, whether or not he knows that a given location is such a place.

As in *Sheena K.*, the simple expedient of modifying the two challenged conditions by imposing a knowledge requirement brings those conditions within constitutionally tolerable limits.

DISPOSITION

The order appealed from is modified to provide that the condition that appellant "not associate with anyone disapproved of by parents and probation officer" is modified to read that appellant "not associate with anyone he knows is disapproved of by parents and probation officer," and the condition that appellant "stay away from places where [narcotics] users congregate," is modified to read that appellant "stay away from places known by him to be places where [narcotics] users congregate." The order is otherwise affirmed.

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_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
CHAVEZ